No. 84-1044 (49)

IN THE
SUPREME COURT
OF THE UNITED STATES
October Term, 1984

PACIFIC GAS AND ELECTRIC COMPANY,
Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, et al.,
Appellees.

ON APPEAL FROM
THE SUPREME COURT OF CALIFORNIA

BRIEF OF THE STATES OF CALIFORNIA, CONNECTICUT, INDIANA, LOUISIANA, MONTANA, NEBRASKA, NEVADA, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, OHIO, RHODE ISLAND, TEXAS AND WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF APPELLEES

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INTEREST OF AMICI

Amici are the States of California, Connecticut, Indiana, Louisiana, Montana, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Ohio, Rhode Island, Texas and West Virginia. Public utilities, operating as monopolies, exist in our jurisdictions. They cannot exist

without State sanction, and having given such sanction, we have the responsibility to closely supervise and regulate these utilities to protect the public from monopolistic abuses. Each State must be free to exercise this power in a reasonable manner for the benefit of its citizens.

Appellant's brief challenges the ability of the State to issue reasonable orders it deems appropriate to enhance public awareness of and participation in the State's regulatory proceedings concerning public utilities by allowing ratepayer associations access to public utility billing envelopes. Such public participation can greatly assist the State in fulfilling its duties to assure efficient utility services at reasonable rates. We consequently appear as amici to protect our traditional police powers over public utilities.

SUMMARY OF ARGUMENT

American policy strongly disfavors monopolies. Public utilities can only operate as monopolies with State permission. Because of the inherent dangers that monopolies pose, public utilities are subject to strict State control. Pursuant to its traditional police powers, the State can issue orders authorizing ratepayer associations to insert their literature in the billing envelopes. Such orders can be properly made regardless of whether the "empty space" in the billing envelopes belongs to the public utility or to the ratepayers.

Requiring envelope sharing does not violate the public utility's right of free speech or free association under the First and Fourteenth Amendments. The challenged order neither compels nor prohibits PG&E's speech. PG&E remains free to enclose its literature in each monthly billing

envelope without restriction. Rigid disclosure requirements prevent the public from confusing ratepayers' literature for that of appellant.

The challenged order promotes the values of free speech by extending a voice to ratepayers. By encouraging ratepayers' speech, the public becomes better informed and more active in the regulatory process. Consequently, the State receives a broader spectrum of views, information, and proposals from its citizens. Thus, the State is able to regulate public utilities in a wiser and more equitable manner.

ARGUMENT

I.

THE STATE HAS THE POWER TO REASONABLY REGULATE THE USE OF BILLING ENVELOPES PURSUANT TO ITS POLICE POWERS OVER PUBLIC UTILITIES

A. Introduction

This case challenges the State's right and ability to regulate public utilities. Public utilities are state-created and regulated monopolies. Like most regulatory agencies, the California Public Utilities Commission (hereinafter "P.U.C." or the "Commission") has a mandated duty to set "just and reasonable rates." Cal. Pub. Util. Code § 451 (*cf.* 16 U.S.C.A. §§ 2601 and 2611(3) re: federal requirements concerning electric utilities). It also has the duty to assure "adequate, efficient, just and reasonable service" to the public. Cal. Pub. Util. Code § 451.

Effectuating these policies requires public awareness of and public participation in Commission activities. For example, state law requires that utilities notify customers of requested rate increases and provide them with an opportunity to contest the proposed increases. Cal. Pub. Util. Code § 454. Federal law pertaining to electric utilities contains similar provisions. 16 U.S.C.A. §§ 2621 and 2625(f).

The P.U.C., after public notice and hearing, gave a consumer advocacy organization, Toward Utility Rate Normalization (hereinafter "TURN"), the right to include inserts in the "empty space" of the billing envelopes of Pacific Gas and Electric Company (hereinafter "PG&E") four times per year. The P.U.C.'s order provides a mechanism whereby knowledgeable ratepayer associations have the opportunity to solicit membership and funds, to disseminate important information, and to participate effectively in the regulatory process. This order was well within the P.U.C.'s constitutional authority to establish rates and rules, and take testimony. (Cal. Const. art. 12, § 6). The "empty space" was determined by prior decision to be the property of the ratepayers and not that of the public utility. (P.U.C. Decision No. 93887.) This order is now final. See P.U.C.'s Motion to Dismiss, p. 8.

PG&E contends that the Commission's order granting TURN access to the billing envelopes is constitutionally infirm as it violates PG&E's rights to freedom of speech and freedom of association under the First and Fourteenth Amendments.

Amici contend that the central issue in this case does not turn on who owns the billing envelope, who pays the postage, or peculiarities of postal rates, but upon more fundamental issues concerning the State's ability to regulate

public utilities. The order is a reasonable exercise of the Commission's regulatory powers. It fosters public knowledge, debate and participation in P.U.C. matters. Moreover, the order encourages our citizenry to petition their government on the cost of vital services and minimizes the potential harm of undue influence by state-created monopolies in subjecting them to more adversarial proceedings before the P.U.C. Ultimately, the goal is to enhance the Commission's ability to set equitable rates and assure reasonable service to the public.

B. Inasmuch as National Policy Strongly Disfavors Monopolies, The P.U.C.'s Order Is a Reasonable Exercise of the State's Police Powers in Regulating State-Created Monopolies

The dangers of monopolies are well known in American history. The Sherman Act —

> "was enacted in the era of 'trusts' and of 'combinations' of businesses and of capital organized and directed to control of the market by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become matter of public concern. The end sought was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury." *Apex Hosiery Co. v. Leader* (1940) 310 U.S. 469, 492-93, 84 L.Ed. 1311, 310 S.Ct. 982.

Section 1 of the Sherman Act (15 U.S.C.A § 1) was drafted in the broadest possible terms. "Language more comprehensive is difficult to conceive." *U.S. v. Underwriters Assn.* (1944) 322 U.S. 533, 553, 88 L.Ed. 1440, 64 S.Ct. 1162; *Goldfarb v. Virginia State Bar* (1975) 421 U.S. 773, 787, 44 L.Ed.2d 572, 95 S.Ct. 2004, *reh. den.* 423 U.S. 886, 46 L.Ed.2d 118, 96 S.Ct. 162. This court has observed that —

> "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States v. Topco Associates* (1972) 405 U.S. 596, 610, 31 L.Ed.2d 515, 92 S.Ct. 1126; *Community Communications v. Boulder* (1982) 455 U.S. 40, 56, 70 L.Ed. 2d 810, 102 S.Ct. 835.

Public utilities are not exempt from antitrust laws. 16 U.S.C.A. §§ 2602(1) and 2603. Their right to exist and function as monopolies is premised upon State authorization and then, only when actively supervised by the State. *Cantor v. Detroit Edison Co.* (1976) 428 U.S. 579, 596-597, 49 L.Ed.2d 1141, 96 S.Ct. 3110; *California Liquor Dealers v. Midcal Aluminum* (1980) 445 U.S. 97, 63 L.Ed.2d 233, 100 S.Ct. 937.

An implied exemption to the Sherman Act was created by this Court in the area of State economic regulation. There is "nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its

legislature." *Parker v. Brown* (1943) 317 U.S. 341, 350-51, 87 L.Ed. 315, 63 S.Ct. 307.

State regulation of public utilities falls well within the "implied exemption" rule. This Court has observed that —

> ". . . [P]ublic utility regulation typically assumes that the private firm is a natural monopoly and that public controls are necessary to protect the consumer from exploitation." *Cantor v. Detroit Edison Co., supra* at 595-596.

In his dissenting opinion in *Consolidated Edison v. Public Serv. Comm'n* (1980) 447 U.S. 530, 65 L.Ed.2d 319, 100 S.Ct. 2326, Justice Blackmun noted the unique nature of a public utility as a state-created monopoly and commented as follows:

> "This exceptional grant of power to private enterprises justifies extensive oversight on the part of the State to protect the ratepayers from exploitation of the monopoly power through excessive rates and other forms of overreaching. For this reason, the State regulates the rates that utilities may charge." *Id.* at 550.

In *Cantor v. Detroit Edison Co., supra,* this Court made a similar observation:

> "Unquestionably there are examples of economic regulation in which the very purpose of the government control is to avoid the consequences of unrestrained competition . . . [A]ll economic regulation does not necessarily suppress competition. On the contrary, public utility regulation typically assumes that the private firm is a natural monopoly and that public controls are necessary to protect the consumer from exploitation." *Id.* at

595-596; *Sale v. Railroad Commission* (1940) 15 Cal.2d 612, 617, 104 P.2d 38.

The P.U.C.'s order promotes effective regulation of utilities. The Commission reasonably found that a knowledgeable and active public represented by experienced ratepayer organizations will provide ideas, suggestions, information and proposals that will lead to better informed decision-making by the Commission. Clearly, the order enhances public scrutiny of public utility proposals.

Rate setting is a complex and difficult process and is beyond the ability of most citizens to present meaningful comment. While state law provides for the payment of attorneys' fees, expert fees and other costs to consumers under certain circumstances (20 Cal.Admin. Code §§ 76.01 *et seq., cf.* 16 U.S.C.A. § 1632), compensation for these expenses are not guaranteed. Nor does the possibility of such compensation necessarily encourage grassroots participation in P.U.C. matters. Requiring public utilities to "envelope share" with ratepayer organizations is the most effective means of affording the general customer population a meaningful mechanism to become involved in P.U.C. matters.

The value of the contributions made by ratepayer organizations in P.U.C. proceedings is substantial. The P.U.C. expressly found that "[p]articipation by representatives of consumer groups tends to enhance the record in our proceedings and complements the efforts of the Commission staff" and that "TURN's proposal will help assure the fullest possible participation in our proceedings." (*See* P.U.C.'s Motion to Dismiss, A-36, Findings 29 and 30.)

Both utility shareholders and utility customers have strong economic reasons for having their views prevail. Shareholders want high rates in order to achieve higher

dividends. Conversely, customers want to minimize the amount of their utility bills. The P.U.C. is interested in making wise, informed decisions so that rates will be "just and reasonable" to customers and so that shareholders may enjoy a reasonable rate of return on their investment. In order to foster these goals, the P.U.C. exercised its broad police powers over public utilities and established a mechanism to give PG&E's 3.6 million electric customers and 2.9 million gas customers an effective voice before the Commission.

In the area of public utility regulation, the competition in the "marketplace of ideas" comes from the public utility's customers rather than from competing businesses. The P.U.C.'s order encourages such competition which is the cornerstone of our economic system. Through weighing competitive ideas, information and proposals, the Commission can more ably discharge its duties in regulating public utilities.

C. The State Has an Important Interest in Promoting Public Awareness and Public Participation in P.U.C. Matters

Both *Consolidated Edison v. Public Serv. Comm'n, supra,* and *Central Hudson Gas v. Public Service Comm'n* (1980) 447 U.S. 557, 65 L.Ed.2d 341, 100 S.Ct. 2343, concerned the public utility's right of free speech. Now this Court must decide if the State can foster the speech of its citizens by requiring public utilities to enclose literature from ratepayer associations in billing envelopes. In the case of PG&E, customers in 48 of the State's 58 counties, 3.6 million electric customers, 2.9 million gas customers, and 3.7 million households are involved. (*See* Appellant's Brief, pp. 3-4.)

The State's ability to provide a forum for speech to millions of its citizens is critical to its police powers over public utilities. Recently, this issue was decided favorably to the State by the West Virginia Supreme Court. *West Virginia-Citizen Action Group et al. v. Public Service Comm'n* (Case No. 16512, decided May 30, 1985) — W. Va. —, — S.E.2d —. In that case, the Appalachian Power Company, a public utility, enclosed a pamphlet in each billing envelope which described acid rain as a "perceived but unproved problem" and urged each customer to contact certain elected officials to defeat pending federal legislation. Several non-profit organizations which had an interest in the acid rain problem requested permission first from the public utility and subsequently from the Public Service Commission to enclose literature presenting the opposing side of the issues in the billing envelopes. The public utility denied the request outright, while the commission denied the request on jurisdictional grounds.

In reversing the order of the Public Service Commission, the West Virginia Supreme Court stressed the importance of "fairness" and providing a "public forum" so that complete information involving controversial issues may reach the consuming public. The Supreme Court stated the following:

> "Accordingly, we hold that where a public utility communicates, through its billing process, with its customers upon matters concerning the costs customers must bear if certain legislation concerning utilities is enacted into law, the Public Service Commission of West Virginia has jurisdiction under its authority to (1) safeguard the interests of the public, and (2) regulate the 'practices, services and rates of public utilities,' to establish methods by which the utility's customers may receive contrasting or opposing viewpoints concerning such costs." (Slip Opinion, p. 21.)

Similarly, the P.U.C.'s order is well within its regulatory powers over public utilities. The Legislature has plenary powers over public utilities. Cal. Const. art. 12, § 5. Many of these powers have been delegated to the Commission including the power to establish its own procedures (Cal. Const. art. 12, § 2), the power to "fix rates, establish rules, examine records, issue subpenas, administer oaths, take testimony, punish for contempt, and prescribe a uniform system of accounts" for all public utilities under its jurisdiction (Cal. Const. art. 12, § 6), and the power to "do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction" (Cal. Pub. Util. Code § 701). The P.U.C.'s order is a reasonable exercise of its authority to fix rates, establish rules and take testimony. It fosters the Commission's information-gathering ability by stimulating public awareness and participation in Commission matters, thereby creating a "check and balance" approach to Commission proceedings through broader-ranging speech.

State law requires that the retail rates charged by public utilities to their customers be "just and reasonable" and that the public has a right to participate in the rate setting process. (*E.g.* Cal. Pub. Util. Code §§ 451 and 454; *cf.*16 U.S.C.A. §§ 2601, 2611, 2621, 2631, 2632.) In furtherance of these legislative goals, the Commission's order provides a forum from which the ratepayers' voice can be heard thereby encouraging a full, public discussion of issues pertaining to rates and services while promoting more

active, informed public participation in the Commission's proceedings. Consequently, the order is a reasonable exercise of the State's supervisory powers over its public utilities because it establishes a procedure to assure that the Commission discharges its duty in setting equitable rates and assuring reasonable services in a wise and prudent manner. As discussed in Argument II, *infra*, the order does not infringe on the utility's freedom of speech or freedom of association.

Even though the ratepayers do not have a constitutional right to include their notices in public utility billing envelopes nor to receive information via such envelopes (*cf. U.S. Postal Service v. Greenburgh Civic Assns.* (1981) 453 U.S. 114, 69 L.Ed.2d 517, 101 S.Ct. 2676; *Seattle Times Co. v. Rhinehart* (1984) — U.S. —, — L.Ed.2d —, 104 S.Ct. 2199; *Perry Educ. Assn. v. Perry Local Educators' Assn.* (1983) 460 U.S. 37, 74 L.Ed.2d 794, 103 S.Ct. 948), *U.S. v. Albertini* (decided June 24, 1985) — U.S. —, 53 U.S.L.W. 4844), the State does have an interest and a right to require such notices when it determines that this is a reasonable means to promote speech and greater participation by the public in the rate-setting process. The value of both political and commercial speech is unquestioned. This court has recognized —

> "[T]hat people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them." *Va. Pharmacy Bd. v. Va. Consumer Council* (1976) 425 U.S. 748, 770, 48 L.Ed.2d 346, 96 S.Ct. 1817.

The goal of the First Amendment is to achieve "the widest possible dissemination of information from diverse

and antagonistic sources . . . " (*F.C.C. v. Nat. Cit. Comm. For Broadcasting* (1978) 436 U.S. 775, 795; 56 L.Ed.2d 697, 98 S.Ct. 2096, quoting from *Associated Press v. United States* (1945) 326 U.S. 1, 20, 89 L.Ed. 2013, 65 S.Ct. 1416) and "to preserve an uninhibited market place of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee." *Red Lion Broadcasting Co. v. F.C.C.* (1969) 395 U.S. 367, 390, 23 L.Ed.2d 371, 89 S.Ct. 1794, also quoting from *Associated Press v. United States, supra* at 20.

"[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana* (1964) 379 U.S. 64, 74-75, 13 L.Ed.2d 125, 85 S.Ct. 209; *Red Lion Broadcasting Co. v. F.C.C., supra* at 390; *CBS, Inc. v. F.C.C.* (1981) 453 U.S. 367, 396, 69 L.Ed.2d 706, 101 S.Ct. 2813. The State has a compelling interest in assuring public access to information and meaningful public participation in the P.U.C.'s regulatory process over monopolistic public utilities. Clearly, the services public utilities provide such as gas, electricity and water serve basic human needs. Each public utility customer has an interest in and is affected by utility rates. To the economically disadvantaged, the cost of such services is vital. The P.U.C. acted reasonably and responsibly in giving utility customers a voice that can be heard through billing envelope access.

Unless this court upholds the P.U.C.'s order, public utilities may be able to limit effective participation by customers at Commission hearings, thereby restricting the free flow of essential information from ratepayers to the P.U.C. No public benefit can come from such a situation. The States must be free to enact effective regulations

assuring a public voice in the establishment of the cost of those services vital to everyone.

II.

THE P.U.C.'S ORDER DOES NOT VIOLATE PG&E'S RIGHTS OF FREE SPEECH AND FREE ASSOCIATION BUT RATHER PROMOTES TRADITIONAL FREE SPEECH VALUES

A. Introduction

At issue in this case is not whether PG&E's speech is restricted, but whether other voices can be heard. The Commission's order does not regulate the content of PG&E's speech nor does it prevent PG&E from inserting its publication, *Progress*, in each billing envelope at its own expense. As the Commission stated —

> "Nothing in the decision prohibits PG&E from disseminating *Progress* in the billing envelope, even in the months in which access is granted to TURN, so long as it pays the additional postage costs, if any; and if the envelope space is lacking, PG&E is free to expand the size of its envelope." P.U.C.'s Motion to Dismiss, p. 15.

Simply put, the order gives billing envelope access to TURN, a ratepayer association with a track record of proven value to the P.U.C. [1]

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[1] The P.U.C. expressly found that "TURN has demonstrated in its testimony and in past participation in proceedings before this Commission an ability to represent the interests of a substantial segment of the PG&E residential ratepayer population." P.U.C.'s Motion to Dismiss, p. A-19.

This Court has recently held that public utilities have the right of free speech under the First and Fourteenth Amendments and may exercise that right through the utilities' billing envelopes. *Central Hudson Gas v. Public Service Comm'n, supra; Consolidated Edison v. Public Serv. Comm'n, supra.* These rulings were based on the high value this country places on public debate and public awareness. "Freedom of speech is 'indispensable to the discovery and spread of political truth,' [citation] and 'the best test of truth is the power of the thought to get itself accepted in the competition of the market. . . .' " *Consolidated Edison v. Public Serv. Comm'n, supra* at 534. In *Central Hudson Gas v. Public Service Comm'n, supra* at 562, this Court stressed that people " 'will perceive their own best interests if only they are well enough informed, and . . . the best means to that end is to open the channels of communication, rather than to close them. . . .' " Our historic commitment to the freedom of speech is based on the premise that the " 'use of such freedom will ultimately produce a more capable citizenry and more perfect polity. . . .' " *Consolidated Edison v. Public Serv. Comm'n, supra* at 534.

In this case, a public utility seeks to suppress speech while the State has fashioned a means to encourage it. The same factors which compelled this court to extend the freedom of speech to public utilities should now prompt it to uphold the P.U.C.'s order extending effective speech to the utility's customers.

B. The State Has a Substantial Interest in Extending Effective Speech to Public Utility Ratepayers

P.U.C.'s rationale for providing public access to billing envelopes through representative ratepayer associations includes the following: (1) the empty space in the envelope belongs to the ratepayers; (2) the utilities have been permitted to use the extra space, without charge, to communicate with ratepayers; (3) the extra space should be used for the benefit of ratepayers; (4) TURN represents the interest of a substantial number of ratepayers and will be unable to do so in future proceedings because of fiscal constraints; (5) allowing TURN to occasionally use the extra space assures more complete ratepayer understanding and participation in energy issues involving their utility; and (6) the P.U.C. benefits by the effective participation of consumer organizations in its proceedings. *See generally* P.U.C.'s Motion to Dismiss, pp. A-19 to A-24, A-33 to A-36.

The Commission summarized its reasons as follows:

> "Our goal . . . is to change the present system to one which uses the extra space more efficiently for the ratepayers' benefit. It is reasonable to assume that the ratepayers will benefit more from exposure to a variety of views than they will from that of PG&E." P.U.C.'s Motion to Dismiss, p. A-22.

PG&E argues that by giving consumers envelope access, the Commission has limited PG&E's speech. For the reasons set forth below, PG&E's speech has not been limited. If, arguendo, there is some limitation, nonetheless, the right to exercise free speech must be balanced against societal interests. *E.g. Hynes v. Mayor of Oradell* (1976)

425 U.S. 610, 48 L.Ed.2d 243, 96 S.Ct. 1755 (noncommercial speech); *Friedman v. Rogers* (1979) 440 U.S. 1, 59 L.Ed.2d 100, 99 S.Ct. 887, *reh. den.* 441 U.S. 917, 60 L.Ed.2d 389, 99 S.Ct. 2018 (commercial speech). The P.U.C.'s order regulating speech must meet *one* of three standards: "(i) a reasonable time, place, or manner restriction, (ii) a permissible subject-matter regulation, *or* (iii) a narrowly tailored means of serving a compelling state interest." (Emphasis added). *Consolidated Edison v. Public Serv. Comm'n, supra* at 535.

Amici believe that when this court balances the State's interest in promoting speech against appellant's interest in suppressing speech under each of the three enumerated standards, the scales will careen down on the side of the State in each instance.

C. The P.U.C.'s Order Does Not Regulate the Time, Place and Manner of PG&E's Speech

"A restriction that regulates only the time, place, or manner of speech may be imposed so long as it is reasonable" and is content-neutral. *Consolidated Edison v. Public Serv. Comm'n, supra* at 536. PG&E seemingly contends that the Commission's order does not meet this standard because the "time, place, or manner" test applies only when the speaker (who is supposedly interfering with PG&E's speech) has a pre-existing right in the speaker's platform whereas the Commission's order requires forced entry into PG&E's billing envelopes. Appellant draws the analogy to governmental limitations on the use of public sidewalks. App. Brief, pp. 20-22. Appellant's argument must fail for three reasons.

First of all, the Commission's order does not attempt to regulate the time, place or manner of PG&E's speech. As previously discussed, PG&E is free to enclose *Progress* in each month's billing envelope, even in the months when TURN's literature is enclosed.

Secondly, the P.U.C. clearly held that the "empty space" was the property of the ratepayers, and not Appellant's. This order is now final. See P.U.C.'s Motion to Dismiss, pp. 8 and A-33.[2]

Thirdly, even if the Commission had found that the empty space belonged to PG&E, proprietary rights in private property are subject to State regulation. *Pruneyard Shopping Center v. Robins* (1980) 447 U.S. 74, 64 L.Ed.2d 741, 100 S.Ct. 2035 is a case in point. At issue in *Pruneyard* was whether members of the public had a right under state law to circulate petitions and distribute pamphlets of a political nature in a privately owned shopping center against the owner's wishes. Holding that they did, this Court observed that "neither property rights nor contract rights are absolute. . . . Equally fundamental with the private right is that of the public to regulate it in the common interest . . . ." *Id.* at 84-85, quoting from *Nebbia v. New York*, (1934) 291 U.S. 502, 523, 78 L.Ed. 940, 54 S.Ct.

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[2] The P.U.C.'s order was not based solely upon that premise. In its order, the P.U.C. emphasized that "our jurisdiction over the extra space does not depend solely or entirely on a determination of the ownership of the extra space or the exact nature of a property right in such space." P.U.C.'s Motion to Dismiss, p. A-6.

Amici do not believe that ownership of the empty space controls the propriety of the Commission's order. Rather, we maintain that the P.U.C.'s order is a valid exercise of the State's police powers over public utilities even absent the ratepayers' proprietary interest in the empty space.

505. This is even more evident when the State is regulating a utility which provides vital services a consumer cannot otherwise obtain.

D. The P.U.C.'s Order Is a Permissible Subject-Matter Regulation

The P.U.C.'s order does not regulate the content of speech. Rather, it controls the vehicle by which speech can be delivered to the public. As discussed in Argument I, *infra*, the State has plenary powers over public utilities, broad powers of which were delegated to the P.U.C. This power has been summarized by the P.U.C. (which has always exercised control over billing envelopes) as follows:

> "The extra space in the billing envelope is a by-product of an activity essential to the operation of the regulated utility — billing. Since billing is an essential and proper function of a regulated utility, this Commission has allowed the utility to recover its reasonable expenses — postage, materials, labor, overhead — from ratepayers. The existence of the extra space is a direct consequence of the act of billing for utility services and the way in which postal costs are assessed.
>
> "Because the billing space is so inextricably related to activities subject to routine regulation, we have repeatedly exercised our authority under the State Constitution and Public Utilities Code section 701 to permit and require the space to be used for the benefit of ratepayers." P.U.C.'s Motion to Dismiss, pp. A-6 to A-7.

Billing envelopes have routinely been used to inform customers of proposed rate hikes and public hearings

without challenge. Public utilities have also been required to enclose important information concerning conservation programs, federal tax law and other public service-oriented information. P.U.C.'s Motion to Dismiss, p. A-7. PG&E does not even challenge that portion of the P.U.C.'s order which gives the Commission first priority "to the billing and legally-mandated notices to customers." P.U.C.'s Motion to Dismiss, p. A-22. Rather, its challenge is limited to the propriety of TURN's use of the empty space.

The government's control over speech has always been recognized where a regulation was a reasonable exercise of its police powers. *E.g., Red Lion Broadcasting Co. v. F.C.C., supra* (broadcasters may be required to air opposing views); *U.S. Postal Service v. Greenburgh Civic Assns.* (1981) 453 U.S. 114, 69 L.Ed.2d 517, 101 S.Ct. 2676 (public access to mail boxes may be properly outlawed); *Perry Education Assn. v. Perry Local Educators' Assn., supra* (public access to school mail boxes may be restricted); *Seattle Times Co. v. Rhinehart, supra* (public access to discovery documents may be restricted); *Ohralik v. Ohio State Bar Assn.* (1978) 436 U.S. 447, 56 L.Ed.2d 444, 98 S.Ct. 1912, *reh. den.* 439 U.S. 883, 58 L.Ed.2d 198, 99 S.Ct. 226 (attorneys' means of soliciting clients may be restricted); *Friedman v. Rogers, supra* (use of trade names by optometrists may be prohibited); *Young v. American Mini Theatres* (1976) 427 U.S. 50, 49 L.Ed.2d 310, 96 S.Ct. 2440, *reh. den.* 429 U.S. 873, 50 L.Ed.2d 155, 97 S.Ct. 2440, (location of adult theaters may be regulated); *F.C.C. v. Nat. Cit. Comm. For Broadcasting* (1978) 436 U.S. 775, 56 L.Ed.2d 697, 98 S.Ct. 2096 (co-ownership of newspapers and broadcast stations may be regulated); *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, (decided July 2, 1985) — U.S. —, 53 U.S.L.W. 5116 (government can properly exclude legal

defense and political advocacy organizations from participation in the Combined Federal Campaign.)

By requiring public access to billing envelopes, the P.U.C. acted reasonably in exercising its regulatory powers over appellant. The Commission uses the billing envelope for its own legal notices "precisely because the billing envelope is such an effective method of communicating with ratepayers." P.U.C.'s Motion to Dismiss, p. A-7. For probably the same reason, PG&E uses the billing envelope to disseminate *Progress.* Creating a doctrine of fairness which provides a shared soapbox as the catapult of free speech pursuant to the State's regulatory powers over public utilities is not unreasonable. *Cf. Red Lion Broadcasting Co. v. F.C.C., supra.*

E. The P.U.C.'s Order Is Narrowly Drawn to Serve a Compelling State Interest

Appellant gives a plethora of reasons why its speech alone should be protected. PG&E claims that the P.U.C.'s order impairs its right to communicate with its customers, mandates the carrying of others' messages, and is not content-neutral. Amici contends the Commission's order democratically enhances its regulatory proceedings by providing free speech to utility customers without impairing the speech of others.

Nothing in the order prohibits PG&E's right to speak to its customers directly through each billing envelope or by any other lawful means. The only restriction is the firmness of appellant's hold on its own purse strings. PG&E may include its literature in each month's billing envelopes as long as it pays the additional postage. Since the empty space is ratepayers' property, Appellant's literature will continue

to be mailed at ratepayers' expense during the other months. The order neither precludes nor compels speech by PG&E or by others. It only provides a forum for speech. *See Red Lion Broadcasting Co. v. F.C.C., supra* at 375.

Appellant expresses concern that "the commission takes on the awesome and completely unmanageable task of picking and choosing from the multitude of competing interests, including political groups, who may wish to communicate through PG&E's envelope." App. Br. p. 25, n. 19. This concern is speculative at best and ignores the facts of this case. The record reveals that out of millions of customers served by Appellant, TURN was the *only* applicant who requested use of the empty space. P.U.C.'s Motion to Dismiss, p. A-35.

Clearly, this lack of other requests emphasizes the importance of opening the billing envelope to the speech of others. The Commission expressly reserved the right to review additional meritorious proposals should any arise in the future. P.U.C.'s Motion to Dismiss, p. A-37. If the P.U.C. abuses its authority concerning future proposals, such orders will obviously be subject to appropriate judicial review.

F. The P.U.C.'s Order Does Not Violate PG&E's Freedom of Association and Right to Remain Silent

Appellant and its amici supporters contend that the Commission's order violates PG&E's right of free association and right to remain silent, relying on *Wooley v. Maynard* (1977) 430 U.S. 705, 51 L.Ed.2d 752, 97 S.Ct. 1428 and *Miami Herald Publishing Co. v. Tornillo* (1974) 418 U.S. 241, 41 L.Ed.2d 730, 94 S.Ct. 2831 for the

proposition that state-mandated speech is constitutionally infirm. Their reliance on these cases is misplaced.

In *Wooley*, this court upheld an injunction prohibiting New Hampshire from arresting and prosecuting motorists who cover up the State's motto "Live Free or Die" on vehicle license plates. This Court found that there was insufficient State interest to compel such ideological speech. *Wooley* did not prohibit the State from displaying its motto on license plates, but merely gave motorists the right to disassociate themselves from it if they wished to do so.

Unlike *Wooley*, the Commission's order clearly states that "all of TURN's bill insert material should clearly identify TURN as its source and state that its contents have neither been reviewed nor endorsed by PG&E or this Commission." P.U.C.'s Motion to Dismiss, p. A-23. Such disclosures have been recognized as an effective means of preventing public confusion. *See Bates v. State Bar of Arizona* (1977) 433 U.S. 350, 384, 53 L.Ed.2d 810, 97 S.Ct. 2691, *reh. den.* 434 U.S. 881, 54 L.Ed. 164, 98 S.Ct. 242; *Central Hudson Gas v. Public Service Comm'n, supra* at 565, 570-71; *Pruneyard Shopping Center v. Robins, supra* at 88; *Zauderer v. Office of Disciplinary Counsel* (decided May 28, 1985) __ U.S. __, 53 U.S.L.W. 4587, 4594.

Appellant's concern that the public will confuse TURN's literature for that of its own is purely speculative. The public is not likely to confuse TURN's literature as being that of PG&E any more than it is likely to regard the Commission's notices as coming from appellant. Certainly, the P.U.C. is not impotent to address the problem of public confusion *should* it ever arise. As the Commission noted, it "expect[s] PG&E and TURN to work together in good faith to overcome problems. If insurmountable problems arise, we may have to issue further clarifying orders." P.U.C.'s

Motion to Dismiss, pp. A-23 to A-24. Surely, the State has the ability to assure that "information flow[s] cleanly as well as freely." *Va. Pharmacy Bd. v. Va. Consumer Council, supra.* The mandated disclosures will assure a clean and free flow of information.

In *Tornillo,* this Court ruled that a Florida statute which required newspapers to publish replies of political candidates they criticized to be an unconstitutional infringement on the newspapers' right to determine what to print and omit. This court observed that if a right-of-access statute was upheld, "editors might well conclude that the safe course is to avoid controversy" (*Id.* at 257) thereby stifling rather than promoting free speech.

The instant case is substantially different from that of *Tornillo.* As Justice White stated in his concurring opinion, "[a] newspaper or magazine is not a public utility subject to 'reasonable' governmental regulation in matters affecting the exercise of journalistic judgment as to what shall be printed." *Id.* at 259. While the number of newspapers may be in attrition, no monopoly exists on news. Other newspapers, publications, radio and television broadcasts expose Americans to a rainbow of viewpoints. Civil remedies are available for candidates who feel they have been libeled, the pursuit of which may in turn constitute news. Unlike public utilities, newspapers are not creatures of government and do not depend on governmental permission for their right to exist. *Cf. Red Lion Broadcasting Co. v. F.C.C., supra.* Nor are newspapers exempt from antitrust laws. *Associated Press v. United States, supra; F.C.C. v. Nat. Cit. Comm. For Broadcasting, supra.* The Commission's order does not compel PG&E to speak against its wishes.

Amici Wisconsin State Telephone Association and Wisconsin Bell, Inc. complain in their joint brief that while "utilities were formerly free to speak to their customers through the billing envelope without concern that their statements would be immediately attacked through the same medium . . . ", the "utilities must respond or suffer the clear implication that the accusations are true. (Footnote omitted)" The Appendix to their joint brief shows examples of the ratepayers' speech. This is exactly the type of public debate the Commission is trying to promote. The Commission will be in a far superior position to properly regulate when responding to a variety of views rather than just one.

CONCLUSION

Public utilities operating as monopolies exist by the grace of the State. Without State sanction, public utilities would not be permitted to exist in monopolistic form. Because of the potential harm to the public which is inherent in any monopoly, the State has the responsibility to carefully regulate that which it created in order to safeguard the legitimate interests of its citizens.

Our American heritage has taught us the value of free speech, the safety valve exposing us as citizens and regulators to competing ideas with the trust that truth will prevail and wise decisions will consequently ensue. With these principles in mind, the P.U.C., having previously found that such input was beneficial to the Commission in exercising its regulatory functions, issued its challenged order, the purpose of which was to provide greater public participation in its proceedings.

It is self-evident to Amici that the State has a compelling and overriding interest in being able to solicit the comments of its citizens in discharging its official duties. Of appellant's millions of customers, only *one* voice asked to be heard. Without that voice, there is silence.

The billing envelope is the sidewalk of public debate in public utility regulation, and the platform from which both the Commission and PG&E speak to the public. Opening the billing envelope to competing messages fosters, not frustrates, free speech. We ask this court to affirm the P.U.C.'s order.

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 3550 Wilshire Boulevard, Suite 916, Los Angeles, California. On this date, July 18, 1985, I served the within BRIEF OF AMICI CURIAE IN SUPPORT OF APPELLEES in re: "Pacific Gas and Electric Company vs. Public Utilities Commission of the State of California" in the United States Supreme Court, October Term, 1984, No. 84-1044;

on the persons interested in said action by placing 3 true copies thereof enclosed in sealed envelopes with first class postage prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

FREDERIC D. WOOCHER, JOHN R. PHILLIPS, CENTER FOR LAW IN THE PUBLIC INTEREST, 3rd Floor, 10951 West Pico Boulevard, Los Angeles, CA 90064;

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MALCOLM H. FURBUSH, PACIFIC GAS AND ELECTRIC COMPANY, P. O. Box 7442, 77 Beale Street, San Francisco, CA 94120;

All parties required to be served have been served

I certify (or declare) under penalty of perjury that the foregoing is true and correct.
Executed on July 18, 1985
at Los Angeles, California.

Kathleen Kaltenbach